APPEAL NO. 93502

The appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 11, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon were: "Did Claimant sustain a new injury on or about (date of injury)? What is the period of Claimant's disability? What is Claimant's average weekly wage (AWW)?" The hearing officer determined that claimant sustained a new injury in the course and scope of his employment on August 19, 1992, that claimant had disability from August 19, 1992, to the date of the hearing and that claimant's AWW was $397.56.

Appellant, carrier herein, contends that claimant did not sustain a new injury in (date of injury), that disability, if any, resulted solely from a prior injury in January 1991, and that the hearing officer's decision is "against the greater weight and preponderance of the evidence and should be reversed . . . ." Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant was employed as a construction material testing technician for (employer) herein. His duties consisted of pushing a wheelbarrow filled with concrete that weighed between 120 pounds and 150 pounds, "making" concrete "test cylinders" of concrete used on the job, loading the cylinders in a truck and taking the cylinders to the laboratory for testing. The concrete test cylinders weighed approximately 30 pounds each.

It is undisputed that claimant sustained a compensable lower back injury in January 1991. Claimant's treating physician for that injury was (Dr. M). An MRI of claimant's lumbar spine was done on 3/4/91 with a conclusion of "[m]arked disc desiccation and degenerative disc disease with narrowing of the interspace at L5. Continued conservative therapy is recommended as needed." (Dr. A), M.D., in a March 19, 1991, consultation had the impression of "[l]umbosacral strain and sprain." Dr. A in an EMG and nerve conduction velocity study on March 14, 1991, found "[p]ositive lumbar EMG/NCV study with left lower lumbar nerve root irritation." Dr. M in a May 8, 1991, report stated claimant had "lumbar disc disease . . . a positive EMG study indicating a radiculitis of the low back." Claimant was ". . . maintained on conservative physical therapy with intermittent manipulative care." Claimant continued off duty until March 23, 1992, when claimant went back on light duty. Claimant testified that his light duty consisted of "more or less just handyman work." MRIs of the cervical and thoracic spine were performed in May 1992.

Claimant testified he was released to go back to work full time with a 50 pound lifting restriction in June 1992. A report dated June 12, 1992, from (Dr. F), D.O., under whom claimant was doing work hardening therapy, indicates claimant ". . . is back to work since

March 23, 1992, working full time with overtime . . . ." Dr. F states "I feel the patient has continued to be symptomatic . . . he will have exacerbations of the pain with times of remission, and he may subsequently need surgery in the future." Dr. M by Report of Medical Evaluation (TWCC-69) dated 7/8/92, certified claimant had reached MMI on 6-24-92 with 30% impairment from the 1-24-91 injury.

Claimant testified that in June when he went back to his regular duties, with a 50 pound lifting restriction, he was assigned to a different job site than that at which he had previously been working. He stated that he worked the project until (date of injury), and that he had to push the wheelbarrow "over rough terrain to get to an isolated place because the cylinder test specimens couldn't be disturbed." Claimant stated his back began to hurt and that he called his supervisor, (Mr. S) on August 13, 1992, and "told him that my back was hurting real bad and that I needed to go to my doctor." Claimant states Mr. S told him ". . . if you stay another week I will pull you off the project . . . " Mr. S, who testified at the CCH, does not dispute this conversation or the essence of what was said. Claimant testified he continued work until August 18, 1993, when his "back had started bothering me so bad until I couldn't stand the working any longer . . . ." Claimant states he called Mr. S and asked for August 19th off but was denied it because employer was short handed. Claimant took time off on August 19th to go to Dr. M. Dr. M took claimant off work and a work excuse was faxed to Mr. S on the same day.

Mr. S acknowledged the two telephone conversations with claimant but states after he received the off work fax he told claimant to bring in the pickup truck he was using, credit cards, keys and copy of the original doctor's slip. The doctor's slip stated claimant was unable to work for 30 days and Mr. S said he thought that claimant's ". . . back was bothering him again." Mr. S's position is claimant did not report a new injury until the benefit review conference of March 18, 1993. Although there is some confusion on dates, Dr. M completed a Specific and Subsequent Medical Report (TWCC-64) regard claimant's August 19, 1992, visit. Regardless of which dated TWCC-64 is used Dr. M notes "[e]xacerbation Lumbar pain" with a prognosis of "30-60 days" disability. On September 4, 1992, claimant had an MRI of the lumbar spine which showed "[p]osterior herniation of the nucleus pulposus at the L5-S1 level." By letter dated April 15, 1993, Dr. M states:

> I have treated [claimant] for a job related injury, January 24, 1991. This injury was to multiple parts of his body; however, his low back was the focus of our attention.
>
> A MRI was performed of his lumbar region in 1991 with the conclusion of a disc desiccation and degenerative changes at the L5 level. [Claimant] was treated with extensive physical therapy treatments and epidural steroid injections and was eventually released from care from this injury.
>
> On August 19, 1992, [claimant] re-presented to my office with severe low back pain stating that he had injured himself once again while working. Due to his severe pain, a repeat MRI study was performed on September 4, 1992, and this study showed a conclusion of posterior herniation at the L5/S1 level.

It is quite obvious that this second injury to [claimant] has created new pathology in his low back region. This pathology will cause [claimant] severe pain and debilitation.

I feel that [claimant] has had two separate low back injuries and would like to provide him the quality medical care he deserves.

At some point, (Dr. O) was selected by the Texas Workers' Compensation Commission (Commission), apparently to resolve a dispute of impairment on the January 1991 injury and by report dated November 20, 1992, filed a TWCC-69 stating "No Comment" on MMI and a 17% impairment rating. Dr. O apparently had the 1991 MRI because he references that diagnosis. It is not clear whether he had the September 1992 MRI and Dr. O makes no reference to it.

Claimant was terminated from employment by letter dated September 30, 1992, "[b]ecause of the amount of time that you were unable to work due to workers' compensation or medical leave, we were unable to hold open your position.

The hearing officer found in pertinent part:

## FINDINGS OF FACT

5.Claimant returned to full time work with a fifty (50) pound lifting restriction in June of 1992.

6.Claimant began having severe back pain on August 13, 1992, and sought medical treatment on August 19, 1992.

7.[Dr. M], on August 19, 1992, advised Claimant not to work and has not recommended that Claimant return to work as of the date of this hearing.

8.On September 4, 1992, Dr. David Frank performed an MRI study concluding Claimant had a posterior herniation at the L5-S1 level.

10.Claimant cannot obtain and retain employment at wages equivalent to his preinjury wage because of a new injury to his lower back sustained on August 19, 1992.

## CONCLUSIONS OF LAW

2.Claimant sustained a new injury in the course and scope of his employment on August 19, 1992.

4.Claimant has disability which began on August 19, 1992, and had not ended as of

the date of this hearing.

The AWW found by the hearing officer was not appealed and hence will not be discussed. Disability, as defined by the 1989 Act, will be governed by the decision of whether there is a new compensable injury or whether the disability relates back to the January 1991, injury.

Carrier's position on appeal is essentially the same as it was at the BRC and CCH in that it contends that claimant did not sustain a new injury in (date of injury), and that claimant has never recovered from his January 1991, back injury. Carrier in its appeal variously refers to facts relating to an alleged new injury on "August 13, 1992, or (date of injury)." The recited issue and decision cover sheet refer to the date of injury as (date of injury), and the hearing officer found a new injury . . . on August 19, 1992. Claimant in his response contends "an injury occurred on or about August 19, 1992." We note claimant did not work on August 19th when he went to see the doctor and carrier emphasizes "claimant did not describe any incident on or about (date of injury), which would have resulted in any disability." Neither the hearing officer's statement of evidence, findings of fact, conclusions of law or decision are helpful in assisting us in determining what his theory of finding a new injury on August 19th might have been. Certainly there could not have been a distinct, specific or discrete incident which occurred on August 19th to have caused the new back injury, because claimant did not work that day.

We have early on subscribed to the proposition that the judgement of the finder of fact should be affirmed if it can be sustained on any reasonable theory supported by the evidence, citing Daylin Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied). *See* Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991; Texas Workers' Compensation Commission Appeal No. 92443, decided September 28, 1992; Texas Workers Compensation Commission Appeal No. 92102, decided April 24, 1992, and Texas Workers' Compensation Commission Appeal No. 93316, decided May 28, 1993. Injury is defined in Article 8308-1.03(27) as damage or harm to the physical structure of the body and includes occupational disease, which in turn in §1.03(36) "includes repetitive trauma injury." The hearing officer could have found that Dr. M's certification of MMI related to the January 1991, injury. He could have also found that wheeling a wheelbarrow containing 120 to 150 pounds of concrete over "rough terrain," "making" concrete test cylinders weighing 30 pounds each, loading them into a pickup and taking them to the laboratory constituted repetitious, physically traumatic activities which resulted in a repetitive trauma injury which in turn aggravated claimant's preexisting back condition. The date of injury of such a repetitive trauma injury would be the date on which the employee knew or should have known that the injury may be related to the employment (Article 8308-4.14), which the hearing officer could have found was August 19th when claimant went to see Dr. M for the severe back pain he was experiencing. Such a theory is supported by the evidence, claimant's testimony and is consistent with the finding by the hearing officer of a new injury on August 19th.

We do not disagree that carrier has a plausible theory that claimant never completely recovered from his January 1991 back injury, as evidenced by his continued complaints of

back pain. However, this theory fails to account for the fact that the March 1991 MRI did not show a herniated disc and the September 1992 MRI clearly showed the changed condition of a herniated disc. Although carrier strenuously argues the logic of its position and points out inconsistencies in the timing of the various doctor's reports, it fails to refute the strong statement, supported by objective MRI medical evidence, of Dr. M's April 15, 1993, report which states "[i]t is quite obvious that this second injury to [claimant] has created new pathology in his low back region." We have noted in Appeal 91002, *supra*, quoting from Daylin, *supra*, that a decision may be affirmed if it can be sustained on any reasonable theory supported by the evidence. A reviewing court is not authorized to set aside a verdict because the trier of fact may have drawn inferences and conclusions different from those the court deems most reasonable, even though the record contains evidence of, or gives equal support to inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Accordingly, we find that the hearing officer's decision was based on sufficient evidence and was not contrary to law. Unless the findings, conclusions, and decision of the hearing officer are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, there is no basis to disturb that determination. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge